Supreme Court, U.S.
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No. 93-994

In The

Supreme Court of the United States

October Term, 1993

CONTINENTAL POTASH CO. and
CROSS LABORATORIES, INC.,

Petitioners,

v.

FREEPORT-McMORAN, INC., FREEPORT MINERALS CO., and NATIONAL POTASH CO.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THERE IS A SUBSTANTIAL PREEMPTION QUESTION AFFECTING IMPORTANT MINERAL INTERESTS OF THE UNITED STATES.

1. By recognizing that the federal leases and regulations were incorporated into the parties' agreement (Pet. A8) and then deciding in the face of those regulations (and contractual commitments to abide by federal law) that highgrading did not breach the contract, the court below necessarily reached the federal issue. The holding that highgrading accords with federal law (Pet. A38) will not stand and cannot be reconciled with the Supremacy Clause. *Wallis v. Pan American Petroleum Co.*, 384 U.S. 63 (1966); *Boesche v. Udall*, 373 U.S. 472 (1963); *Lowey v. Watt*, 684 F.2d 957 (D.C. Cir. 1982); *Dawn Mining Co. v. Watt*, 543 F.Supp. 841 (D.C.D.C. 1982), *affirmed* 704 F.2d 1293 (D.C. Cir. 1983). *Wallis* and *Lowey* compel state courts as well as federal courts to apply federal law whenever interpretation of private contract rights under the Act significantly impacts the federal program.

2. The Opinion below holds that highgrading comported with Respondents' covenant of good faith and fair dealing under State law. (Pet. A38) Yet federal law incorporated into the contract required Respondents to employ "reasonable diligence, care and skill," "prevent undue waste," and work towards "ultimate maximum recovery." 30 U.S.C. § 187; Pet. I, J2. In *Cook v. El Paso Nat. Gas Co.*, 560 F.2d 978 (10th Cir. 1977), the court harmonized a contract assigning a lease issued under the Mineral Leasing Act with federal laws against wasting potash so as to

preserve an assignor's cause of action for failure of the assignee to protect her property while giving effect to federal conservation interests. Here, the New Mexico Supreme Court made no effort to reconcile federal and state law. Federal law already holds that highgrading is wasteful and breaches standards under the Mineral Leasing Act. *Dawn Mining, supra.* Here, however, the New Mexico court ignored this rule and held highgrading inactionable by a royalty holder, even though that activity ruined the Government's as well as the Petitioners' reversion and was forbidden by federal law.

By insisting that the State court made its ruling below only on State law grounds, the Brief in Opposition begs the question at the heart of this Petition: Whether the New Mexico Supreme Court was obligated to apply federal law to the contract issues surrounding highgrading.

II. THE COURT HAS JURISDICTION.

1. The federal anti-waste regulations (Pet. O) and lease terms incorporated by reference in the contract of assignment were in evidence at trial (Pet. G, H, I, J, O). The regulations were the subject of unopposed instructions to the jury, which was also instructed that the federal leases and regulations were incorporated into the parties' contract. (Pet. J2) Based on these instructions, the jury found that highgrading occurred and that it constituted a breach of contract damaging Petitioners. Respondents do not challenge the finding that highgrading occurred. The jury's verdict (Pet. L) was therefore based on federal law. Nothing more was needed to preserve the preemption issue.

2. The jury based its computation of damages on highgrading. (Pet. A13, n. 6) And the Opinion below notes that highgrading occurred within the limitations period. (Pet. A30) Thus, the Opinion's holding on highgrading was indispensable to the New Mexico court's resolution. The false statement that highgrading was "in furtherance of the royalty holders' interests" (Pet. A38; *but see*, Pet. L2, M15, M16, M21, Q4, Q7, and Q8) was the centerpiece of that holding because it made it possible to declare that highgrading did not breach the contract, even though that contract incorporated the federal leases and regulations (and applicable case law, *e.g., Dawn Mining*) as acknowledged in the Opinion. (Pet. A8) In consequence, there was no adequate state law ground for the ruling below and this Court has jurisdiction. The idea that highgrading benefits a royalty holder is untenable and cannot serve as an independent state ground sufficient to bar Supreme Court review. *Ward v. Love County*, 253 U.S. 17, 22 (1920); *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464 (1918); and *see*, Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed.) 179.

3. The chronology on page 13 of the Response omits important circumstances. The unpublished memorandum decision of April 22 was vacated August 10, 1993, when the New Mexico Supreme Court significantly modified and published a new ruling as an Opinion. (Pet. A2, C2, C8) Under New Mexico procedure, NMSA 1978, SCRA 12-404(A) (Pet. N1), the motion for rehearing filed August 23, 1993 (Pet. D1) was timely. When the court below considered and denied that motion September 23, 1993,

the ninety-day period for filing in this Court began pursuant to Supreme Court Rule 13.1. This Petition was filed within the ninety-day period.

III. THERE IS AN IMPORTANT DUE PROCESS QUESTION AS WELL.

The Response fails to address the Due Process violations in Question 3 of the Petition. Although this Court does not often accept cases for review which rest on a State court's subterfuge, obfuscation or mischaracterization of the record, it should take, and in the past has taken, cases such as this one where the due process violations by a State high court not only injure private persons but also adversely affect important interests of the United States. *Kern-Limirick Inc. v. Scurlock*, 347 U.S. 110, 121 (1954); *Union Pac. R. Co. v. Public Service Com'n*, 248 U.S. 67 (1918); Stern, Gressman & Shapiro, *supra*, at 187.

FOR THESE REASONS, the Petitioners pray that the writ of certiorari issue.

Respectfully submitted,

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